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NO. 89-448

# IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM 1989

W.DON WELCH, Executive Director, South Carolina State Ports Authority, HENRY TECKLENBURG, JR., DON McELVEEN, ROBERT V. ROYALL, JR., JAMES B. MOORE, JOSEPH P. GRIFFITH, and HARRY A. CHAPMAN, Members of the Board of the South Carolina State Ports Authority, Petitioners,

v.

SAMUEL COAKLEY, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## BRIEF IN OPPOSITION TO CERTIORARI

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## QUESTION PRESENTED

**Was the court of appeals correct in holding that a state employee's claim for reinstatement to his job is a claim for prospective relief and is therefore maintainable under the doctrine of Ex parte Young, rather than being barred by the Eleventh Amendment to the Constitution of the United States?**

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The parties to this petition, citations to opinions below, and jurisdiction of this Court are described in the Petition.

## CONSTITUTIONAL PROVISIONS

In addition to the eleventh amendment to the Constitution, which is quoted in the Petition, this case equally involves the due process clause of the fourteenth amendment to the Constitution of the United States:

> "Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

and the Supremacy Clause of the Constitution:

> "Article VI. . . . This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

## STATEMENT OF THE CASE

This petition arises from an interlocutory appeal in which the court of appeals affirmed the district court's refusal to dismiss respondent's suit for reinstatement to his job with the South Carolina State Ports Authority.

In December 1986, respondent Samuel Coakley was fired by the Ports Authority on grounds that he had taken money from the crew of a truck for getting the truck unloaded. He denied the charges and passed a polygraph test, but to no avail.

Respondent appealed his firing, but at the same time, he objected that the Ports Authority's hearing procedures violated due process in several respects. Despite his objections, the appeal was conducted according to the objectionable procedures, and his firing was upheld.

Respondent filed this suit seeking an injunction to reinstate him and seeking damages such as backpay. The defendants were the Ports Authority (from which both reinstatement and damages were sought) and the members of the agency's Board of Directors and its Executive Director (all of whom were

sued in their official capacities only and from whom only reinstatement was sought).

All the defendants moved to dismiss on eleventh amendment grounds. The district court held that the Ports Authority is a state agency entitled to eleventh amendment immunity from suit and dismissed it as a defendant and dismissed all claims for damages. The court refused, however, to dismiss the individual defendants (against whom only reinstatement was sought) on the ground that the rule of Ex parte Young, 209 U.S. 123 (1908), authorizes an injunction against public officials to make them conform to the Constitution and laws of the United States. The district court therefore allowed this case to go forward for reinstatement only, with no backpay.

The petitioners then filed an interlocutory appeal. The court of appeals held that under this Court's eleventh amendment decisions, respondent's claim for reinstatement alleged an ongoing constitutional violation which is the prerequisite for invoking the Ex parte Young doctrine, and it therefore affirmed the district court.

This petition followed.

## REASONS FOR DENYING THE WRIT

The writ of certiorari should be denied because there is no conflict between the decision below and cases either of this Court or other courts of appeals. The court below correctly recognized that respondent's claim for reinstatement is a traditional remedy which has been repeatedly recognized as permissible prospective relief under Ex parte Young, and the decision below is fully consistent with this Court's cases reconciling the eleventh and fourteenth amendments.

The petitioners' argument is essentially that they cannot be sued in federal court in any way, shape, or form, even if they have unconstitutionally deprived respondent of due process. This argument, if accepted, would have the eleventh amendment virtually swallow up the fourteenth amendment, in violation of the repeated teachings of this Court.

1. This case does not involve a single or isolated incident, but rather official policies promulgated by the petitioners to govern employee appeals. Respondent alleged that the petitioners' procedures did not comply with due process, and therefore that his termination

had been carried out in violation of his constitutional right to due process. In addition to a claim for backpay and other damages (which the district court dismissed), respondent asserted a continuing interest in returning to his job, alleged that the violation which keeps him out of his job is continuing, and therefore requested an injunction ordering the petitioners to reinstate him as a Ports Authority employee.

His claims were based on the fourteenth amendment, which guarantees him due process of law, and on the Supremacy Clause, which makes the federal Constitution the supreme law of the land. Because of Hans v. Louisiana, 134 U.S. 1 (1890), however, respondent was not allowed to sue his State or the state agency directly, and therefore he sued the named persons (living human beings) responsible for his agency's decisions, and requested that they be enjoined to reinstate him, in accordance with the rule of Ex parte Young, 209 U.S. 123 (1908).

2. Ex Parte Young was designed to reconcile the eleventh and the fourteenth amendments to the Constitution of the United States. The terms of the reconciliation are essentially that actions to make states pay for past wrongs are barred, while actions to correct

those wrongs for the future are permitted. While the difference between the two "will not in many instances be that between night and day," Edelman v. Jordan, 415 U.S. 651, 667 (1974), the constitution demands that a fair balance be struck which recognizes the commands of both the eleventh and the fourteenth amendments.

This Court has repeatedly held that suits under Ex parte Young are "necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of the United States." Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 105 (1984). Likewise, "the availability of prospective relief of the sort awarded in Ex parte Young gives life to the Supremacy Clause." Green v. Mansour, 474 U.S. 64, 68 (1985).

3. Both courts below correctly found that respondent's request for an injunction requiring reinstatement is permissible prospective relief. Petitioners, though, argue that an order to reinstate is retrospective and thus barred. In so arguing, petitioners ignore the reality of employment termination and reinstatement, and ignore the extensive body of law on this precise question.

The basis for petitioners' argument that reinstatement is retrospective is the notion that since reinstatement is the opposite of termination, the alleged violation must have occurred in the past and at one time only. But this mechanistic approach assumes that equity, and the Constitution, are empowered only to prevent something which has not yet happened, and that once an act has taken place, it is beyond reach even if it is still a live issue.

4. The petitioners claim to find support for their argument in this Court's decision in Papasan v. Allain, 478 U.S. 265 (1986), but never explain how that decision supports their argument. At the same time they ignore numerous decisions of this Court which have routinely treated reinstatement of state employees as permissible relief.[1] Petitioners also fail to note that in addition to the fourth circuit, at least three other circuits and a number of district courts have found that reinstatement of a discharged public employee is

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[1] See, e.g., Keyishian v. Board of Regents, 385 U.S. 589 (1967); Perry v. Sinderman, 408 U.S. 593 (1972); Meachum v. Fano, 427 U.S. 215 (1976); and Dixon v. Love, 431 U.S. 105 (1977).

prospective relief for the purposes of Edelman v. Jordan analysis.[2]

5. Petitioners' position is not simply novel, it is extreme. Having succeeded in striking respondent's claim for backpay and other damages, they wish this Court to grant certiorari to hold that respondent is also barred from seeking an injunction that could reinstate him. In essence, petitioners contend that federal courts should not have jurisdiction over any aspect of a procedural due process case involving the discharge of a state employee.[3] They also necessarily contend that all the Supreme Court and lower federal court decisions

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[2] E.g., Dwyer v. Regan, 777 F.2d 298, 302 (2nd Cir. 1986)("Reinstatement is purely prospective injunctive relief which orders the state official to return the former employee to the state payroll."); Elliot v. Hinds, 786 F.2d 298, 302 (7th Cir. 1986)("The goal of reinstatement and the removal of damaging information from the plaintiffs [sic] work record is not compensatory; rather, it is to compel the state official to cease her actions in violation of federal law and to comply with constitutional requirements."); McConnell v. Adams, 829 F. 2d 1323 (4th Cir. 1987); Laskaris v. Thornburgh, 661 F.2d 23 (3rd Cir. 1981).

[3] A due process case could involve a request for backpay or damages, or an order enjoining future application of the constitutionally defective procedure to other employees, or reinstatement. The eleventh amendment would bar a discharged employee from bringing the first type of suit, and standing rules would likely bar the second type. Therefore if petitioners are successful here in shutting off the third type, the whole area of due process for state employees will be essentially off limits to the federal courts.

authorizing reinstatement relief to a discharged state employee were wrongly decided. The petitioners' position ignores cases from Ex parte Young forward, and instead of harmonizing the eleventh and fourteenth amendments, it misuses the former while erasing the latter. Such a revolution in the law has no support in reason or precedent.

## CONCLUSION

Respondent prays that the writ of certiorari be denied.

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